No. 11661

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HOME INDEMNITY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, a Corporation, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

THOMAS P. MENZIES and
HAROLD L. WATT,
548 South Spring Street, Los Angeles 13,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

PAGE

Reply to Point I of appellee's brief 5

Reply to Point II and Point III 5

Reply to Point IV 6

Appellee's cases distinguished 9

Conclusion 14

TABLE OF AUTHORITIES CITED

Cases	Page
Albert v. Public Service Mutual Casualty Ins. Corp., 226 App. Div. 284, 42 N. Y. S. (2d) 124	13
Associated Indemnity Corporation v. Davis, 136 F. (2d) 71	10
Bachhuber v. Boosalis, 200 Wis. 574, 229 N. W. 117	3
Carabelli v. Mountain States Life Insurance Company et al., 8 Cal. App. (2d) 115	3
Coleman v. New Amsterdam Cas. Co., 247 N. Y. 271, 160 N. E. 367	7, 12
Conold v. Stern, 138 Ohio St. 352, 35 N. E. (2d) 133	4
Fidelity Union Fire Ins. Co. of Dallas, Texas v. Kelleher, 13 F. (2d) 745	2
Gilbert v. Indemnity Insurance Co. of North America, 252 N. Y. 330, 169 N. E. 403	8
Hynding v. Home Accident Insurance Co., 214 Cal. 743	10
Margellini v. Pacific Auto. Ins. Co., 33 Cal. App. (2d) 93	6, 9
Miller v. Union Indemnity Co., 209 App. Div. 455, 204 N. Y. Supp. 730	9
Norton v. Central Surety & Ins. Co., 9 Cal. App. (2d) 598	10
Ocean Accident & Guarantee Corp. v. Lucas, 74 F. (2d) 115	10
Pacific Indemnity Co. v. McDonald et al., 107 F. (2d) 446	9
Panhans v. Associated Indemnity Corp., 8 Cal. App. (2d) 532	10
Porter v. Employers' etc. Corp., Ltd., 40 Cal. App. (2d) 502, 104 P. (2d) 1087	13
Rockmiss v. New Jersey Mfgrs. Ass'n Fire Ins. Co., 112 N. J. L. 136, 169 Atl. 663	12
State Farm Mutual Auto. Ins. Co. v. Bonacci, 111 F. (2d) 412	4
Storer v. Ocean Accident & Guarantee Co., 80 F. (2d) 470	7
United States Fidelity & Guaranty Co. v. Wyer, 60 F. (2d) 856	12
Western Casualty & Surety Co. v. Weimar, 96 F. (2d) 635	10
Whittle v. Associated Indemnity Corporation, 130 N. J. L. 376, 33 A. (2d) 866	4

Statute	Page
Code of Civil Procedure, Sec. 2052	7

No. 11661

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HOME INDEMNITY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, a Corporation, *et al.,*

Appellees.

APPELLANT'S REPLY BRIEF.

It is conceded in the brief of appellee Standard Accident Insurance Company in its statement of the case (App. Br. p. 2) that the appellant's statement of the case relating to the issuance of the policy of insurance by the appellant and appellee and the quoted provisions of each policy involved are correct.

In this state of the record the primary question involved in the appeal becomes whether defendant White, operator of the car involved in the accident, was within the coverage of appellant's public liability policy, or was brought within that coverage by the appellee, plaintiff below.

The insurance clause of appellant's policy expressly provided that the insurance was subject to the conditions

contained in the policy. [R. p. 26.] Condition "6" expressly provided that "no action shall lie against the company unless, as *a condition precedent thereto,* the insured shall have fully complied with the provisions of this policy * * *."

Condition "17" contained the provision requiring the co-operation of the assured. [R. p. 28.]

Thus, the burden of establishing that White had complied with appellant Home's insurance policy and the coverage thereby asserted, was assumed by the appellee, Standard Accident Insurance Company of Detroit, plaintiff below, in order that its own policy issued directly to White might be termed excess coverage, as defined in its policy. As plaintiff in the action it was as incumbent upon appellee to establish the compliance by White with the terms of appellant's policy as it would have been had the action been instituted directly by White.

Of course, if the appellant had initiated the action below to have it established by declaratory judgment that its policy was not in force, it would thereby have assumed the burden of proof of establishing the breach by White of the conditions of its policy.

In the case of *Fidelity Union Fire Ins. Co. of Dallas, Texas, v. Kelleher,* 13 F. (2d) 745, the Court said in reversing a judgment in favor of the plaintiff in an action to recover upon a policy of fire insurance:

> "Following the steadily adhered to decisions of the Supreme Court, it is seen that the present case is directly within the well settled rule of the federal

courts, that the terms of the policy are the measure of the liability of the insurer, and that, to recover, the insured must prove that he is within those terms.

"In Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231, the court said: 'It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made.' "

To the same effect is *Carabelli v. Mountain States Life Insurance Company et al.,* 8 Cal. App. (2d) 115 at 117, where the Court said:

"The general rule is that an insured must bring himself within the express terms of the policy before he is entitled to recover thereon and where these terms are plain and explicit, the courts cannot create a new contract for the parties by a forced construction of such plain and explicit terms * * *."

In the case of *Bachhuber v. Boosalis,* 200 Wis. 574 (229 N. W. 117), the Court held that a clause that the insured shall co-operate fully with the company is a *condition precedent,* failing to perform which, in the absence of waiver or estoppel, constitutes a defense to liability on the policy.

In *State Farm Mutual Auto. Ins. Co. v. Bonacci,* 111 F. (2d) 412, the Court appears to have recognized that a co-operation clause was a condition precedent to the recovery under the policy involved in that action, which was brought by the insurance company to avoid liability under its automobile liability policy, because of the insured's failure actively to co-operate in the defense of a damage action against the insured. The case is also authority that in such action the insured was bound by his testimony and admissions against interests made in the damage action, and written statement and proof of loss furnished to the insurer.

In *Whittle v. Associated Indemnity Corporation,* 130 N. J. L. 376 (33 A. (2d) 866), the Court held a co-operation clause is a condition in the nature of a promissory warranty and condition precedent to the right of recovery.

Also *Conold v. Stern,* 138 Ohio State 352 (35 N. E. (2d) 133), the holding was that a clause in a liability insurance policy requiring the insured's co-operation, aid and assistance in the defense of an action against him is a material condition of the policy, the violation of which by the insured forfeits his right to claim indemnity under the policy and is a condition precedent, failure to perform which, in the absence of waiver or estoppel, constitutes a defense to liability on the policy.

Reply to Point I of Appellee's Brief.

The principle of law referred to by appellee that it is the duty of the trial court to render judgment in accordance with the testimony and evidence it determined was most worthy of belief, does not meet the objection of the appellant to the conflict in White's own statements, which were pointed out in appellant's opening brief, and which were so utterly inconsistent as to being incapable of being reconciled.

Obviously, statements diametrically opposite concerning the happening of the accident and White's connection with it could not both be true, and yet, the trial court undertook to find that White had made neither conflicting nor misleading statements. [R. p. 183.]

Under *Point II* of its opening brief, appellant has pointed out fully the particulars in which the findings of fact necessary to sustain the judgment are not supported by evidence worthy of belief.

Reply to Point II and Point III.

Under Point II appellee appears to argue that if, without White's co-operation, appellant made an investigation of the facts of the accident, it would not be prejudiced by any misstatement of facts given by White, and yet proceeds to argue under *Point III* that counsel for appellant having the duty of conducting the case before the Court, must do so on the basis of White's statements, and not on the result of their own investigation of the facts.

It would have been one thing for the Honorable District Court to find and determine that the appellant must de-

fend the assured, although judgment and establishment of liability on the part of White was inevitable, but the appellant argues that the trial court erred and invaded the province of counsel in holding that "it was the duty of appellant Home Indemnity Company to try to establish the truth of the statement of George White, that he was asleep and did not know the accident occurred, so long as George White maintains such statement is true." [R. p. 184.]

In *Margellini v. Pacific Auto. Ins. Co.,* 33 Cal. App. (2d) 93, it appears that the co-operation clause was expressly made a condition subsequent rather than a condition precedent to a liability under the public liability and property damage insurance policy involved in the action. In holding that there was a breach of the co-operation clause and that prejudice was presumed as a matter of law therefrom, the Court recognized the right of the insurer to have a truthful statement from the insured himself.

Reply to Point IV.

Under *Point IV* the appellee argues that there was no breach of the co-operation clause and that appellant was not prejudiced by reason of White's statements.

While recognizing on pages 26 and 27 of its brief the possibility of a defense to the actions for damage based on contributory negligence, counsel for appellee appear to overlook the prejudice to the appellant inherent in having to conduct a defense of the action without the benefit of White's testimony or assistance as a witness, or in the alternative, offering him as a witness, therefore vouching for his credibility and being confronted with his previous various conflicting statements. It scarcely seems to re-

quire extended argument that White had destroyed his usefulness as a witness in the damage actions in view of the provisions of Section 2052 of the California Code of Civil Procedure, which provides:

> "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony * * *."

In *Storer v. Ocean Accident & Guarantee Co.,* 80 F. (2d) 470 (6th Cir.), it was held that failure of the insured under automobile liability policy to co-operate with insurer in defense of action *was not cured by co-operation of insured upon second trial, especially where insured's credibility had been destroyed by false testimony upon first trial,* the Court stating at page 472:

> "The co-operation clause was both material and important. Its purpose was twofold: (1) To require the insured to aid in preparing the case for trial and in making proper defense; and (2) to prevent collusion between the insured and a friendly claimant. 'When the condition was broken, the policy was at an end, if the insurer so elected.' "

Even if the appellant had no defense against the charge of negligence or escape from liability, it was entitled to the assistance of White at the trial upon the issue of damages.

The cases hereinafter cited fully recognize that it is not an excuse for a breach of the co-operation clause in an insurance policy that there is no defense to the action, or that the facts, if correctly stated, could only lead to liability.

In *Coleman v. New Amsterdam Cas. Co.,* 247 N. Y. 271, 160 N. E. 367, Judge Cardozo said in a case involv-

ing an asserted breach of the co-operation clause of policy of insurance:

> "The plaintiff makes the point that the default should be condoned, since there is no evidence that co-operation, however willing, would have defeated the claim for damages or diminished its extent. For all that appears, the insurer would be no better off if the assured had kept its covenant, and made disclosure full and free. Co-operation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. The case is not one of the breach of a mere covenant, where the consequences may vary with fluctuations of the damage. There has been a failure to fulfill a condition upon which obligation is dependent."

In *Gilbert v. Indemnity Insurance Co. of North America,* 252 N. Y. 330 (169 N. E. 403), the Court said in holding that the trial court erred in taking the question (compliance with co-operation clause) from the jury and directing a verdict in favor of the plaintiffs:

> "Who can tell whether Jacob Wasserman was telling the truth when he made the affidavit or when he said at the time of the trial that he could not remember. A failing memory may be a false excuse as well as a true one. A witness has been sent to jail for perjury who falsely testified to loss of memory. The testimony of Wasserman, if given according to his affidavit, was at least material on the trial of the negligence cases. It might have helped the defendant and the insurance company and again it might not have been of any avail. *This, however, is not the point. The insurance company was entitled to the defendant's assistance and to a truthful statement of the cause of the accident.* * * *"

In *Margellini v. Pacific Auto. Ins. Co.,* 33 Cal. App. (2d) 93, at page 99:

> "If it be assumed that any information which could have been furnished, in response to the appellant's request, would have disclosed or led to the discovery of the fact that no defense existed, that very fact would have shown the desirability of settling the claim. * * *"

In *Miller v. Union Indemnity Co.,* 209 App. Div. 455, 204 N. Y. Supp. 730, the Court said:

> "It is of no relevancy that the claim against the respondent (assured) was a valid one, and one which, in the ordinary course, if the conditions of the policy had been complied with, the appellant company (insurer) would ultimately have been obliged to pay. Such conditions would be robbed of nearly all practical value if, in applying them, the question of the validity of the professed claim must be investigated."

Appellee's Cases Distinguished.

On page 40 of its brief, appellee cites cases in which it is asserted the defense of breach of the co-operation clause was denied by the courts where the factual situation was more favorable to the insurer than are the facts in the case at bar.

Two, at least, of the cases cited arose in jurisdictions which have not adopted the rule that prejudice is presumed as a matter of law from the breach of the co-operation clause, but have held that prejudice must be proved.

In *Pacific Indemnity Co. v. McDonald et al.,* 107 F. (2d) 446, the Court, at page 449, expressly recognized that the question of whether there had been a breach of

the co-operation clause was one of local law and in that case was controlled by the law of the State of Oregon where the policy issued, the accident occurred, and the case tried.

Similarly, the case of *Associated Indemnity Corporation v. Davis,* 136 F. (2d) 71, decided in the Third Circuit Court of Appeals, arose in Pennsylvania, and the Court said at page 74:

> "The Pennsylvania decisions are to the effect that the insurer is not relieved from liability unless the insured's failure to co-operate results in substantial prejudice and injury to the insurer's position."

In *Western Casualty & Surety Co. v. Weimar,* 96 F. (2d) 635, decided in the Ninth Circuit Court of Appeals on May 2, 1938, while the clause requiring co-operation of the assured did not apparently differ materially from the co-operation clause in the policy of appellant Home, involved in the action at bar, it does not appear that compliance with the condition was expressly declared to be a condition precedent to the institution of any action on the policy, as did the Home's policy [Condition "6," R. p. 27]; and in so far as the opinion is based on the California cases cited therein of *Hynding v. Home Accident Insurance Co.,* 214 Cal. 743; *Panhans v. Associated Indemnity Corp.,* 8 Cal. App. (2d) 532, and *Norton v. Central Surety & Ins. Co.,* 9 Cal. App. (2d) 598, in holding that prejudice from the breach of a co-operation clause of an insurance company must be proved, the cases having been superseded by the *Valladao* case, it does not appear that the opinion can be regarded as based on the California law.

In the case of *Ocean Accident & Guarantee Corp. v. Lucas,* 74 F. (2d) 115, in affirming the judgment for the

plaintiff the Court said that the main issue in the case was whether Butler (one of the appellees) made full disclosure to the appellant before the trial of the facts to which he testified at the trial in the state court.

The Court said at page 117 that unless Butler had complied with the conditions of the policy Mrs. Lucas (plaintiff below) could not recover.

The Court noted that there were three variances between Butler's two accounts of the accident:

First, in a written statement given to the adjuster, Butler declared that the accident was caused by the fact that a car turned abruptly in front of him into his lane of traffic, which caused him suddenly to stop his car, and that his car was thereupon struck in the rear by a car, which shoved him forward so that he collided with an oncoming car which was somewhat over the center line of the street. At the trial Butler, who was called for cross-examination by Mrs. Lucas and was not examined by the appellant, said nothing about being shoved by a car behind him.

Second, Butler, in his signed statement, said that at no time was his automobile over the center line of the street. At the trial Butler said "after the collision" the front end of his car was over the center line, and that skidmarks of his car extended from 18 to 24 inches beyond the center line.

Third, the signed statement said that without any warning the car at Butler's right pulled abruptly to the left and in front of him. At the trial, Butler stated that he "thought" he "could beat him to it * * * and stepped on it."

The policy required the assured, whenever requested by the company, to "co-operate with the Company, except in a pecuniary way, in all matters which the Company deems necessary in the defense of any suit."

The District Court charged that it was the duty of Butler under the policy to give the truth in any statements which he made to the company, according to his best capacity and understanding of the events and circumstances of the accident, and that it would not be co-operating, as required by the policy, if Butler consciously testified to a set of facts materially different from that which he had given in any previous statement to the company's agent and attorneys.

The Court found no reversible error in the charge of the District Court, and in the course of its opinion noted the definition of "co-operation" given by Mr. Justice Cardozo in *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 367: Co-operation means "that there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense."

The Court also cited *United States Fidelity & Guaranty Co. v. Wyer,* 60 F. (2d) 856, to the effect that a deliberate and wilful falsification of material facts would have violated the terms of the policy.

The appellant believes that the record amply sustains its position that there was a deliberate and wilful falsification of the material facts by White in the case at bar.

In *Rockmiss v. New Jersey Mfgrs. Ass'n Fire Ins. Co.,* 112 N. J. L. 136, 169 Atl. 663, next cited by appellee, it was held that there was not sufficient variance in the accounts of the accident given by the assured to the insurer

to amount to a violation of the co-operation clause, the variance apparently being, mainly, as to the rate of speed of the vehicle being operated, coupled with an admission of negligence.

Counsel for appellant are unable to agree that the variance in the statements is at all comparable to the conflicting statements made by White in the instant case.

In *Albert v. Public Service Mutual Casualty Ins. Corp.*, 226 App. Div. 284, 42 N. Y. S. (2d) 124, the variance appears to have been in the difference of the statements made by the driver of the insured to the insurer, and that made to the Motor Vehicle Department; in the first, the driver having reported that he "stopped, then felt a bump from the rear of the car, got out and saw the colored man lying on the ground"; and in the report to the Motor Vehicle Department, that "while backing the truck he accidentally struck the plaintiff with back of the car."

While it was held that the variance did not constitute a lack of co-operation, it is interesting to note that in the dissenting opinion by Justices Martin and Dore it was stated that "the arguments that the insurers would be no better off if the insured had made a truthful disclosure of the facts, and if the company would have found out by its own investigation the facts, including the contradictory admissions of liability, misconceived the effect of refusal to co-operate.

Porter v. Employers' etc. Corp., Ltd., 40 Cal. App. (2d) 502, 104 P. (2d) 1087, last cited by appellee and involving an asserted breach of co-operation clause of insurance policy, can only be regarded as applicable on the assumption that the record sustained the finding of the trial court that there was no breach of the co-operation clause, and the conflicting statements of the insured again

appeared to involve nothing more than a variance in the speed of the car and the condition of the tires, a factual situation not comparable to the facts of the case at bar.

Conclusion.

In conclusion, it is respectfully submitted that the record does not sustain the findings and judgment of the Honorable Trial Court, that there has been no breach of the co-operation clause of the appellant's policy, nor the finding that the appellant has not been prejudiced thereby, nor has the defendant White been brought within the coverage of appellant's policy, for which reasons the judgment appealed from should be reversed.

Respectfully submitted,

THOMAS P. MENZIES and
HAROLD L. WATT,
By HAROLD L. WATT,
Attorneys for Appellant.